will inevitably decline to interfere, permitting the governmental and popular recognition [16] of the amendment to control.[17]

These cases, however, must be deemed exceptional and not to be followed as general authorities. In a recent case in Alabama,[18] in which no such fatal consequences would have ensued from a refusal to sustain the amendment, the Supreme Court of that state was clearly right in declining to pronounce valid an irregularly adopted amendment, although that court itself had previously decided a case [19] under the amendment in question and it had been recognized by the political departments of the state. When constitutional provisions are unambiguous, courts ought not to yield to considerations of expediency in expounding them,[20] unless the situation has got beyond their control.

EFFECT OF SECOND MORTGAGE ON THE RIGHTS OF A PARTY SUBROGATED TO THE SECURITY OF THE FIRST MORTGAGEE. — To secure a debt, D, holding an unincumbered fee in Blackacre, executed a first mortgage upon it in favor of C, who had the mortgage duly recorded. In the jurisdiction, it gave C a legal lien on the property. D then misapplied money belonging to S in paying the debt, C receiving it without notice of the wrong. This payment was not recorded. Later, D executed a second mortgage on Blackacre to P, who paid value and had no knowledge of the mortgage to C. Having discovered the misapplication of his money, S seeks to come in ahead of P against the security, claiming subrogation to the rights of C under the first mortgage.[1]

Subrogation is an equitable doctrine.[2] It seeks to afford to a party

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[16] It might also be argued that these cases could be rested on the proposition that since the ultimate power rests in the people, they may amend their constitution in a manner other than that therein provided. That is to say, that it is possible for the people by acquiescing in an amendment to place it in the constitution despite the procedural omission of their agent, the legislature. Whether in a given case such power has been exercised would be for the court to determine. But in order to support this argument it must be conceded that the situation, though analogous to one of private agency, is sufficiently dissimilar, so that it is possible for the people thus to adopt the amendment without knowledge of the legislative omission. Moreover, the court cannot affirmatively deny the constitution under which it acts.

[17] As a corollary to the proposition that the proper adoption of a constitution is a political question (see note 3, *supra*), acquiescence by the departments of a state government in a new constitution establishes its validity. Taylor *v.* Commonwealth, 101 Va. 829, 44 S. E. 754 (1903); Brickhouse *v.* Brooks, *supra*.

[18] Hooper *v.* State, 89 So. 593 (Ala., 1921). For the facts of this case, see RECENT CASES, *infra*, p. 615.

[19] Cornelius *v.* Pruet, 204 Ala. 189, 85 So. 430 (1920).

[20] See Ellingham *v.* Dye, *supra*, note 1; COOLEY, *op. cit.*, 107n.

[1] McCullough *v.* Elliott, [1921] 3 W. W. Rep. 361. For the facts of this case, see RECENT CASES, *infra*, p. 624. The holding of the court in favor of S was probably influenced by the fact, appearing from language in the decision, that P took his lien only upon the interest which D actually had at the time, whatever that interest might be. Upon this view of the case the decision was clearly right.

In the principal case, D had applied S's money in only partial liquidation of C's mortgage before P's mortgage was taken. This does not affect the problems presented by the case, however, since S did not seek subrogation until after C's claim had been entirely satisfied.

[2] The theory of subrogation is that, though payment to the creditor extinguishes the primary obligation of the debtor to him at law, equity recreates it, *eo instante*, in

whose property has been used [3] in the payment of another's debt every advantage by way of priority [4] or security [5] which the creditor had for enforcing his claim. But if, when a secured debt is paid by the use of the money of a third person, the entire legal interest becomes revested in the debtor, and if by the doctrine of subrogation the third party acquires only equitable rights in the security, these rights will be of no avail against a subsequent *bona fide* purchaser or mortgagee of the security. To determine the relative rights of the third person and the subsequent purchaser or mortgagee, the inquiry must be directed (1) to the nature of the interest which the mortgagor had in the security at the time of the execution of the second mortgage and (2) to the effect of the record as notice.

At common law, a mortgage is a conveyance of land as security for the payment of a debt within a specified time.[6] Upon due payment of the debt, the security is discharged, and title revests in the mortgagor without the necessity of a reconveyance.[7] *A fortiori*, a reconveyance is not required if, instead of giving the mortgagee a defeasible title, the mortgage is regarded as creating only a legal lien.[8] Under either theory, if payment is made at or before maturity,[9] the most that equity can do is to place D under an obligation to hold the security in trust for S, and P will prevail unless the record can be relied upon as notice of S's interest.

If, however, under the common-law theory, payment is not made till after the law day, the condition upon which the mortgagee's title is defeated is not complied with, and the mortgagor is forced to procure a reconveyance before his legal title is revested.[10] Meanwhile, the mortgagee holds the legal title in constructive trust for the mortgagor, who continues to hold the equity of redemption. But since, in the principal

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favor of the party subrogated, and it further seeks to secure for this party whatever rights and advantages, subordinate to this primary obligation, the creditor may have had to enforce performance. It thus has a double effect. See C. C. Langdell, "A Brief Survey of Equitable Jurisdiction," 1 HARV. L. REV. 55, 68–70; 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1211; 2 WILLISTON, CONTRACTS, § 1265.

[3] There is some slight authority that subrogation was granted originally only in the case of sureties. See Heuser *v.* Sharman, 89 Iowa, 355, 359, 56 N. W. 525, 526 (1893). It was later applied to cover cases of payment under compulsion or in order to protect an interest of the payer. Emmert *v.* Thompson, 49 Minn. 386, 52 N. W. 31 (1892); Bank of Ipswich *v.* Brock, 13 S. D. 409, 83 N. W. 436 (1900). See SHELDON, SUBROGATION, 2 ed., § 3. The tendency has been to extend it to all cases which in equity and good conscience merit such relief. See 26 HARV. L. REV. 261. *Cf.* 15 *Id.* 494; 16 *Id.* 307, commenting on Thurstan *v.* Nottingham, etc., Society, [1901] 1 Ch. 88; [1902] 1 Ch. 1; [1903] A. C. 6. The principal case is quite in harmony with this tendency.

[4] *Re* Pathé Frères Phonograph Co. of Canada, Ltd., 20 Ont. W. Notes 476 (1921); Love *v.* North America Co., 229 Fed. 103 (8th Circ., 1915).

[5] See 2 WILLISTON, CONTRACTS, §§ 1266–1268.

[6] Strictly speaking, payment must be made on a specified day. As to the effect of payment before the law day, see 1 JONES, MORTGAGES, 6 ed., §§ 886, 887.

[7] Merrill *v.* Chase, 3 Allen (Mass.) 339 (1862); Town of Clinton *v.* Town of Westbrook, 38 Conn. 9 (1871).

[8] Shields *v.* Lozear, 34 N. J. L. 496 (1869); Kortright *v.* Cady, 21 N. Y. 343 (1860).

[9] If payment was made by a third person, a different result might be reached by an agreement for the assignment of the security. The rights of the third person would then be measured by the agreement. Smith *v.* Commercial Nat'l Bank, 7 S. D. 465, 64 N. W. 529 (1895); Freeman *v.* M'Gaw, 15 Pick. (Mass.) 82 (1833).

[10] See 1 JONES, MORTGAGES, 6 ed., § 889.

case, the mortgagor, D, has paid his debt by a fraud on S, and S is in equity entitled to repayment out of the security, this equitable interest will, in turn, in the hands of D,[11] be subject to a constructive trust in favor of S.[12] If, however, there is a subsequent assignment of this interest by D to a *bona fide* purchaser, the rights of the *cestui*, S, should, it is submitted,[13] be cut off. Aside from whatever effect the record may have, therefore, P should take his mortgage free and clear.

Under the lien theory, the analysis is different. The life of the lien is the debt, and whenever this is discharged, the lien is ordinarily extinguished with it.[14] Nevertheless, in form, the mortgage is a conveyance upon condition subsequent that the debt be paid on a certain day. If the condition is not satisfied, the automatic revesting of title in the mortgagor on payment of the debt is somewhat anomalous, but the effect is something like that in cases of estoppel by deed. But, whereas in estoppel by deed the shooting of title is based on a legal obligation, in this case it is based on an equitable obligation.[15] In *Eyre* v. *Burmester*,[16] which

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[11] In the principal case, there is no direct right from C to S. The position of C is that of an innocent transferee of a *res* which the transferor held in trust for a *cestui* and which he agreed to return to the transferor upon a condition subsequent. If the transferee knows that the transferor is about to commit a second breach of trust if the *res* is returned to him, to return it would be to collude in a breach of trust, and in that case there is a direct right in favor of the *cestui*. See Austin W. Scott, "The Nature of the Right of the *Cestui Que Trust*," 17 COL. L. REV. 269, 282, *et seq.*; 11 COL. L. REV. 686. But if there is no reason to believe that the transferor will deal with it improperly, it seems that the transferee, holding now subject to the trust, and further, having agreed to return the *res* to the trustee, is under a duty only to carry out this agreement. See HUSTON, ENFORCEMENT OF DECREES IN EQUITY, 138; Austin W. Scott, "Participation in a Breach of Trust," 34 HARV. L. REV. 454. Indeed, some cases have gone so far as to hold that even when there is collusion between the trustee and his transferee, the *cestui* obtained no direct right against the latter. Parker *v.* Hall, 2 Head (Tenn.) 641 (1859); Hart *v.* Citizens' National Bank, 105 Kan. 434, 185 Pac. 1 (1919). Such decisions are, however, insupportable. See 33 HARV. L. REV. 738; 20 COL. L. REV. 489.

[12] There need be no fiduciary relation between the parties. Newton *v.* Porter, 69 N. Y. 133 (1877); Pioneer Mining Co. *v.* Tyberg, 215 Fed. 501 (9th Circ., 1914). *Contra*, Campbell *v.* Drake, 4 Ired. Eq. (N. C.) 94 (1844).

[13] This proposition is based upon the theory that, though equity will not aid even an innocent purchaser in obtaining that to which he may be equitably entitled but the securing of which would cause the completion of a breach of trust, it will nevertheless not take from him that which he has already completely secured, whether it be a legal or an equitable interest. See J. B. Ames, "Purchase for Value Without Notice," 1 HARV. L. REV. 1. See also Ames, "The Doctrine of Price *v.* Neal," 4 HARV. L. REV. 297. If the assignment to P does divest D of all his equitable interest, P will prevail, despite S's prior equity which D merely held in trust. Sturge *v.* Starn, 2 M. & K. 195 (1833); Lane *v.* Jackson, 20 Beav. 535 (1855); Penny *v.* Watts, 2 De G. & Sm. 501 (1850); *Re* French's Estate, 21 L. R. Ir. 283 (1887). By the weight of authority at present, however, the prior equity will prevail. Cave *v.* Cave, 15 Ch. D. 639 (1880); Hill *v.* Peters, [1918] 2 Ch. 273. See Phillips *v.* Phillips, 4 De G., F. & J. 208 (1861). See also 2 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 682 *et seq.*

[14] Shields *v.* Lozear, *supra*; Kortright *v.* Cady, *supra*. See 1 JONES, MORTGAGES, 6 ed., § 889.

[15] In this respect, the principal case is stronger than estoppel by deed for the point taken below (see *infra*), that the equities of the situation may govern the automatic operation of rules of law. Here, the equities of the situation need control only an equitable obligation, upon which the shooting of the title depends, whereas in estoppel by deed they control the legal obligation upon which the operation of the estoppel rests.

[16] 10 H. L. Cas. 90 (1862). See SCOTT, CASES ON TRUSTS, 674, note.

was a case of estoppel by deed, when the grantor acquired his interest subject to the equity of a third person, it was held that title did not shoot to the grantee.[17] In the principal case, to permit the automatic shooting of title from the mortgagee to the mortgagor might endanger[18] the equity of a third person, and it might well be similarly held that the title remained, therefore, in the mortgagee.[19] D would again have only an equity, and the results would be the same as under the common-law theory.

Wherever S's rights are subject to be cut off by a subsequent[20] *bona fide* purchase, the effect of the record as notice becomes of the first importance.[21] The record contains no reference to S; but it does show an outstanding claim against the property. Though this claim has been legally extinguished, an equitable interest in it still remains. The presence of this apparently outstanding claim on the record should put a reasonable purchaser on his inquiry as to its discharge.[22] If, after due diligence, he learns only that C has been paid and nothing of S's rights, he should be protected.[23] But to require the inquiry first, seems most in accord with the policy behind the recording acts.

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[17] See 35 HARV. L. REV. 456.

[18] In this respect, the principal case is weaker than estoppel by deed for the argument here advanced, because there, the shooting of title would cut off the equity of a third person, whereas in the principal case it would only endanger it. However, the analogy is close. See note 15, *supra*.

This whole argument on the analogy to estoppel by deed is based upon the hypothesis that the assignment of an equitable interest to a *bona fide* purchaser will not cut off a prior equity. Otherwise, the failure of legal title to shoot to D would not afford any greater protection to S than if it did become revested in him. This hypothesis is against the view here advocated, but since we are considering the protection of S's interest as a matter of actual practice, we should take notice of the law as it is. As above stated, note 13, *supra*, the law is at present in accord with the doctrine of Cave *v.* Cave, *supra*, and this argument is, therefore, relevant.

[19] Of course equity is ordinarily powerless to control the situation at law. J. R. *v.* M. P., Y. B. 37 HENRY VI., folio 13, pl. 3. In addition to the exception cited, however, there is also the familiar one under the Statute of Uses, which, whenever it executes a use, reproduces the equitable situation at law.

[20] If the second mortgage was taken before the extinguishment of the legal interest of C, S should prevail. This would be almost the exact case of Eyre *v.* Burmester, *supra*. *Cf.* notes 15 and 18, *supra*.

[21] The record itself does not generally control the transmission of title directly. See WEBB, RECORD OF TITLES, §§ 4–6. Town of Clinton *v.* Town of Westbrook, *supra*.

[22] So far as the record shows, C is the only one entitled to have it cancelled, and it seems necessary that he be consulted. But if resort to him fails to put P on notice of S's rights, and if, still with no reason to suspect their existence, he takes the encumbrance, he should be protected.

[23] In McCullough *v.* Elliott, note 1, *supra*, there is a *dictum* to the effect that had the record of the senior incumbrance been cancelled, the plaintiff would still have been entitled to subrogation over a subsequent incumbrancer whose incumbrance had not been taken nor his position changed in reliance on the records showing the discharge. In support of this *dictum* Home Savings Bank *v.* Bierstadt, 168 Ill. 618, 48 N. E. 161, is cited, which contains also only a *dictum*. This view, however, apparently overlooks the fact that the right of the party subrogated cannot be greater than the original right of the creditor, which was limited by the recording act. See 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1214.